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Supreme Court, U.S.
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In The
Supreme Court of the United States

SAN REMO HOTEL, L.P., *et al.*,

Petitioners,

v.

CITY AND COUNTY OF
SAN FRANCISCO, CALIFORNIA, *et al.*,

Respondents.

**On Writ Of Certiorari To The
United States Court Of Appeals
For The Ninth Circuit**

BRIEF OF COMMUNITY RIGHTS COUNSEL, CALIFORNIA STATE ASSOCIATION OF COUNTIES, LEAGUE OF CALIFORNIA CITIES, AND AMERICAN PLANNING ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

TIMOTHY J. DOWLING*
DOUGLAS T. KENDALL
Community Rights Counsel
1301 Connecticut Ave., N.W.
Suite 502
Washington, D.C. 20036
(202) 296-6889

**Counsel of Record for the Amici Curiae*

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INTEREST OF THE *AMICI CURIAE*[1]

Community Rights Counsel is a nonprofit, public interest organization that assists government officials in defending against constitutional challenges to federal, state, and local protections. It has filed *amicus* briefs with this Court and federal and state courts across the country in many regulatory takings cases, including *Brown v. Legal Found. of Wash.*, 538 U.S. 216 (2003), *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302 (2002), and *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001).

The California State Association of Counties (CSAC) is a nonprofit corporation, with membership consisting of all 58 counties in the State of California. CSAC sponsors a Litigation Coordination Program administered by the County Counsels' Association of California and overseen by the Association's Litigation Overview Committee, composed of county counsel throughout the State. The Litigation Overview Committee monitors litigation of concern to counties statewide and has determined that this case is a matter affecting all counties in California.

The League of California Cities is an association of 476 cities united in promoting the general welfare of cities and their citizens. The League is advised by its Legal Advocacy Committee, which is composed of 24 city attorneys representing all 16 divisions of the League from all parts of the State. The committee monitors appellate

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[1] Counsel for the parties did not author this brief in whole or in part. No person or entity other than the *amici* made a monetary contribution to the preparation or submission of this brief. The parties have consented to the filing of this brief, and letters of blanket consent have been filed with the Clerk.

litigation affecting municipalities and identifies those cases that are of statewide significance.

The American Planning Association (APA) is a non-profit public interest and research organization founded in 1978 to advance the art and science of planning at the local, regional, state, and national levels. It represents more than 37,000 practicing planners, officials, and citizens involved, on a day-to-day basis, in formulating and implementing planning policies and land use regulations. The organization has 46 regional chapters, as well as 19 divisions devoted to specialized planning interests. The APA's members work for development interests as well as state and local governments.

The question presented involves the intersection of the federal Full Faith and Credit Act, 28 U.S.C. § 1738, with *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985). As organizations that represent government officials and planners, *amici* have a strong interest in ensuring that state and local governments retain their ability to regulate property to promote public health, safety, and welfare. Their ability to do so would be significantly constrained if takings claimants were allowed, in contravention of the Full Faith and Credit Act, to relitigate issues of law and fact already fully litigated in state courts.

SUMMARY OF ARGUMENT

1. To clarify the issues presented in this case, this Court first should reaffirm that when a landowner seeks compensation in state court as required by *Williamson County*, it may do so only under state law because no federal takings

claim exists when the landowner files in state court. In the words of *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985), "if a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation." *Id.* at 195.

The *Williamson County* Court rested this analysis on the language of the Just Compensation Clause and the very nature of the constitutional right. It also drew from parallel doctrines regarding the need to pursue statutory remedies prior to filing a federal takings claim against the United States under the Tucker Act, as well as requirements to pursue post-deprivation remedies under the Due Process Clause. Although certain takings cases have reached this Court on appeal from state court rulings on federal takings claims, the parties in those cases did not question whether the federal claim was properly filed in state court, and thus this Court had no occasion to address the issue.

The first principles articulated in *Williamson County* have direct consequences for the application of the Full Faith and Credit Act. Because no federal takings claim against a state or local official exists until the state court denies compensation under state law, claim preclusion generally would not apply once the *Williamson County* state-compensation requirement is fulfilled. As a result, there is no need for so-called "*England* reservations" to protect federal takings claims from claim preclusion.

The Full Faith and Credit Act requires the application of state issue preclusion law to matters resolved in state court. But a landowner may return to federal court to argue that the federal Constitution is more protective than

state law. This process ensures that federal courts, including this Court, remain the ultimate arbiter of the scope of federal takings law.

2. San Remo argues that the Full Faith and Credit Act unfairly leaves it without an unfettered opportunity to litigate its federal takings claims in federal court. But it fails to reconcile this argument with a series of cases where this Court, following the mandate of the Full Faith and Credit Act, has applied preclusion even where the result is to deprive a federal claimant of a federal forum. In *Allen v. McCurry*, 449 U.S. 90 (1980), the Court explicitly rejected San Remo's argument "that every person asserting a federal right is entitled to one unencumbered opportunity to litigate that right in a federal district court." *Id.* at 103.

Cases governing the application of the Full Faith and Credit Act to federal claims regarding workplace discrimination reaffirm that preclusion principles promote essential principles of repose, federalism, judicial economy, and comity between state and federal courts. San Remo has failed altogether to offer any plausible explanation as to why state judges would treat property owners unfairly.

In many communities, the playing field for land use disputes already is tilted in favor of developers and other potential takings claimants. Pro-development professionals serve in disproportionate numbers on planning and zoning boards. Developers commonly use litigation, or the mere threat of litigation, as a tool for advancing their interests in land use negotiations. Granting developers and other takings claimants two bites at the apple, in contravention of the Full Faith and Credit Act, would unfairly shift the playing field further to their advantage.

3. Issues concerning the continued viability of *Williamson County*'s longstanding, repeatedly reaffirmed state-compensation requirement are not raised in San Remo's petition or merits brief. Addressing them without adequate notice and briefing would be fundamentally unfair to municipalities and the public at large.

ARGUMENT

I. A Federal Takings Claim Against a State or Local Government Does Not Exist Until the State Courts Deny Just Compensation.

As a threshold matter, the Court should clarify the nature of the claim to be filed in state court under *Williamson County*. This issue pertains directly to the question presented, and reaffirmation of applicable first principles would greatly assist in elucidating precisely how the Full Faith and Credit Act applies to takings claimants that file in federal court after seeking just compensation in state court.

Simply put, when a takings claimant files in state court as required by *Williamson County*, the claimant may seek compensation *only* under state law. The claimant may not simultaneously file a federal takings claim in state court. As discussed below, this reading of the federal Just Compensation Clause and this Court's takings precedents differs markedly from that adopted by several federal appellate courts. We respectfully submit, however, that the analysis below is the only one consistent with this Court's longstanding pronouncements.

Williamson County itself could not be clearer on this point: "[I]f a State provides an adequate procedure for

seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation." 473 U.S. at 195. This principle flows directly from the text of the Constitution: "The Fifth Amendment does not proscribe the taking of property; it proscribes taking without just compensation." *Id.* at 194. In other words, the state-compensation requirement is compelled by the very nature of the protected right: "The nature of the constitutional right therefore requires that a property owner utilize [state] procedures for obtaining compensation *before* bringing a § 1983 action." *Id.* at 194 n.13 (emphasis added). The "special nature" of this right makes it different from other constitutional rights in a way that requires special treatment. *Id.* at 196 n.14.

This analysis makes plain that *Williamson County* does not send federal takings claimants to state court. Rather, it sends property owners who do *not* have a federal takings claim to state court, precisely because they do not have a federal claim. And their federal takings claim does not arise upon their mere appearance in state court. It arises, in the words of *Williamson County*, only after the landowner has "been denied just compensation" in state court under state law. *Id.* at 195.

In explaining this conclusion, *Williamson County* relied on cases requiring exhaustion of federal statutory compensation schemes prior to filing a federal takings claim under the Tucker Act, 28 U.S.C. § 1491. In *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984), for example, the Court held that takings claimants challenging actions under the federal pesticide laws must first pursue compensation remedies under those laws as a "precondition" to a federal takings claim under the Tucker Act. *Id.* at 1018. Because

the Just Compensation Clause does not require payment in advance of, or even contemporaneously with, the taking, there is no cognizable federal constitutional claim against the United States unless the claimant is denied compensation under available statutory compensation procedures. *Id.* at 1016-19. Likewise, where a reasonably adequate compensation process exists in state court, "the property owner 'has no [federal] claim against the Government' for a taking" until that process is tested. *Williamson County*, 473 U.S. at 194-95 (quoting *Monsanto*, 467 U.S. at 1018 n.21).

Williamson County also drew an analogy to due process claims, observing that for those claims "the State's action is not 'complete' in the sense of causing a constitutional injury 'unless or until the state fails to provide an adequate postdeprivation remedy for the property loss.'" *Williamson County*, 473 U.S. at 195 (quoting *Hudson v. Palmer*, 468 U.S. 517, 532 n.12 (1984)). In the same way, because the Just Compensation Clause is satisfied by an adequate process for obtaining compensation, "the State's action here is not 'complete' [in the sense of causing constitutional injury] until the State fails to provide adequate compensation for the taking." *Williamson County*, 473 U.S. at 195.

This Court repeatedly has reaffirmed these bedrock principles in a way that shows that no federal constitutional violation occurs until the property owner seeks and is denied compensation through available procedures. In *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985), the Court stressed that "so long as compensation is available for those whose property is in fact taken, the governmental action is not unconstitutional." *Id.* at 128 (citing *Williamson County*). In *Preseault v. ICC*, 494

U.S. 1 (1990), the Court reiterated that if the government provides a process for obtaining just compensation, "then the property owner 'has no [federal] claim against the Government for a taking.'" *Id.* at 11 (quoting *Williamson County*). And in *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725 (1997), the Court quoted with approval *Williamson County*'s central premise that "'if a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation.'" *Id.* at 734 (quoting *Williamson County*).

The Court's most recent reaffirmation of these principles came in *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999), where the majority insisted that a landowner "suffer[s] no constitutional injury from the taking alone" so long as a state court is available to provide just compensation. *Id.* at 710 (citing *Williamson County*); *accord*, *id.* at 714 (plurality) ("If the condemnation proceedings do not, in fact, deny the landowner just compensation, the government's actions are neither unconstitutional nor unlawful."). For this reason, a federal court "cannot entertain a takings claim under § 1983 unless or until the complaining landowner has been denied an adequate postdeprivation remedy." *Id.* at 721. This analysis was an integral part of the *Del Monte Dunes* ruling that because the statutory takings suit there "sounded in tort and sought legal relief, it was an action at law." *Id.* at 710-11.

These basic principles apply with equal force to direct condemnations. Many states have enacted "quick-take" statutes that provide for ouster of condemnees well before the award of compensation by state commissioners or state

court. *See* 6 Julius L. Sackman, Nichols on Eminent Domain § 24.10 (3d ed. 2002). If the Just Compensation Clause were deemed violated immediately upon the taking of property, these statutes would give rise to immediate federal court actions that could be used to circumvent established state remedies. As recognized in *Williamson County*, however, a violation of the Just Compensation Clause is not "complete" until the claimant is denied just compensation through available state court procedures.

The obligation to pursue available state-compensation procedures prior to filing a federal claim in federal court is not limited to relief available in state courts, but extends to administrative processes as well. The Court made this explicit in *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340 (1986), stating that a federal court "cannot determine whether a municipality has failed to provide 'just compensation' until it knows what, if any, compensation the responsible administrative body intends to provide." *Id.* at 350. The Congress, too, may authorize an administrative agency to determine just compensation in the first instance, subject to judicial review. The Federal Communications Commission, for instance, routinely determines compensation for physical takings of utility pole space authorized by the federal Pole Attachment Act, 47 U.S.C. § 224, a process that comports with the federal Constitution so long as adequate judicial review is available. *See Gulf Power Co. v. United States*, 187 F.3d 1324, 1331-37 (11th Cir. 1999) (citing *Williamson County*).[2]

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[2] An earlier version of the Pole Attachment Act did not mandate third-party access to utility poles and thus did not work a taking. *See FCC v. Florida Power Corp.*, 480 U.S. 245, 250-54 & n.8 (1987). In 1996, however, the Act was amended to require such access (*see Gulf Power*

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Cases involving administrative determinations do not raise the same preclusion issues as the instant case, but they reaffirm that property owners may not simply bypass established administrative processes and seek compensation directly in federal district court instead. Other statutes that authorize administratively determined compensation, subject to judicial review, would be gutted if property owners could simply sidestep the agency and sue for compensation in federal district court. These procedures are especially common during times of war.[3] Their pervasiveness is difficult to estimate, but to cite just one example, with respect to compelled utility interconnections many physical takings claims might be filed immediately in federal district court, without the benefit of an administrative record, if claimants could circumvent FCC and other federal administrative processes for the determination of just compensation.[4]

Co., 187 F.3d at 1327), resulting in the Eleventh Circuit ruling upholding the Act's statutory compensation scheme. *Id.* at 1331-37. Other courts agree that a legislature may authorize an administrative body to provide for just compensation in the first instance, subject to judicial review. *E.g.*, *Wisconsin Central Ltd. v. Public Serv. Comm'n of Wisc.*, 95 F.3d 1359, 1369 (7th Cir. 1996) (citing *Williamson County*).

[3] *E.g.*, *United States v. Cors*, 337 U.S. 325, 332 (1949) (upholding a compensation award by the War Shipping Administration for the taking of a steam tug because on the facts presented the legislative compensation formula was "coterminous" with the constitutional standard.); *United States v. John J. Felin & Co.*, 334 U.S. 624, 641-42 (1948) (upholding a compensation award by the Office of Price Administration for meat products seized by the government).

[4] *Cf. Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) (a government-compelled permanent physical occupation of property is a per se taking, no matter how small); *Qwest Corp. v. United States*, 48 Fed. Cl. 672, 693 (2001) ("[S]tate and federal courts alike view the implementation of mandatory access provisions requiring a telecommunications provider or utility to make space available on its

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We acknowledge that several takings cases have reached this Court on appeal from state court rulings that addressed federal takings claims. *E.g.*, *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992). On the reading of the Fifth Amendment presented in *Williamson County*, these cases might be viewed as anomalous because no federal claim should have been asserted in state court. Perhaps this Court's role in those cases could be explained by the heavy reliance on federal precedents by the state court rulings being reviewed.[5] But more to the point, the parties in these cases did not question whether the federal claim was appropriately filed in state court, and thus this Court had no occasion to address the issue. Cases that do not speak to the issue cannot justify abandoning the repeated holdings of *Williamson County* and other cases that directly address it. On the reading of the Fifth Amendment set forth in *Williamson County* and its progeny, review by this Court might occur after the state court ruling (*see* note 5), and would certainly be available after the claimant returns to federal court (*see* pp. 13-15, *infra*).

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premises for a competitor to affix its own equipment as constituting a physical taking under *Loretto* * * * .").

[5] *See Fitzgerald v. Racing Ass'n of Central Iowa*, 539 U.S. 103, 106 (2003) (U.S. Supreme Court "jurisdiction exists where federal cases are not 'being used only for the purpose of guidance' and instead are 'compel[ling] the result'" in state court) (citation omitted); *Ohio v. Reiner*, 532 U.S. 17, 20 (2001) (per curiam) ("'[T]his Court retains a role when a state court's interpretation of state law has been influenced by an accompanying interpretation of federal law.'") (quoting *Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Engineering, P.C.*, 467 U.S. 138, 152 (1984)); *Pennsylvania v. Muniz*, 496 U.S. 582, 588 n.4 (1990) (although state court ruling expressly invoked the state constitution, Supreme Court could review the ruling because the state court explained that state and federal protections were identical).

Because *Williamson County* and similar rulings make clear that no federal constitutional violation exists until a state court denies just compensation, the state court claim required to be filed by *Williamson County* is a claim for compensation under state law, and only under state law. *See Bakken v. City of Council Bluffs*, 470 N.W.2d 34, 37 (Iowa 1991) ("Bakken's claim for a taking under section 1983 is not ripe for adjudication in this action until the remedy of inverse condemnation, or an equivalent state remedy, is first pursued.") (citing *Williamson County*); *Impink v. City of Indianapolis*, 612 N.E.2d 1125, 1127 (Ind. Ct. App. 1993) (where landowners filed both federal and state takings claims in state court, federal claim was premature under *Williamson County*); *Drake v. Town of Sanford*, 643 A.2d 367, 369 (Me. 1994) (same).

This straightforward reading of *Williamson County* has direct consequences for the application of preclusion principles under the Full Faith and Credit Act. Because no federal takings claim against a state or local official exists until the state court denies compensation under state law, claim preclusion generally would not apply once the *Williamson County* state-compensation requirement is fulfilled. Claim preclusion generally would not apply in these circumstances because state preclusion law typically is inapplicable to claims that had not accrued at the time of the prior litigation.[6] And because there is no claim

[6] *E.g.*, *Untracht v. West Jersey Health System*, 803 F. Supp. 978, 984 (1992) ("New Jersey claim preclusion does not apply to claims over which the initial New Jersey court lacked jurisdiction, i.e., to claims which could not have been brought * * *."), *aff'd*, 998 F.2d 1006 (3d Cir. 1993) (table); *see generally* Restatement (Second) of Judgments § 26(1)(c) (generally no claim preclusion if the initial court lacks subject matter jurisdiction to hear the claim).

preclusion, there is no need for so-called "*England* reservations" to protect federal takings claims from claim preclusion.

Unfortunately, several federal appellate courts have ignored this Court's teachings and assumed takings claimants may file federal takings claims in state court while they are fulfilling the *Williamson County* state-compensation requirement. This approach has resulted in an unnecessarily complicated system of *England*-like reservations in certain circuits.[7] A clear reaffirmation of *Williamson County*'s theoretical underpinnings in the instant case would remove this needlessly complex underbrush.

Notwithstanding the overheated rhetoric by San Remo and its *amici*, *Williamson County* does not create a "trap" (Pet. Br. 14) that forever "slams" the federal courthouse door on takings claimants (Home Builders Br. 17). To be sure, as explained in Section II below, the Full Faith and Credit Act requires the application of state issue preclusion law to matters litigated and resolved in state court. This issue preclusion would apply to factual findings, as well as legal conclusions to the extent the federal court determines that state and federal takings law are coextensive. But a landowner may return to federal court to argue that the federal Constitution is more protective than state law, a process that often involves a legal

[7] *See Santini v. Connecticut Haz. Waste Mgmt. Serv.*, 342 F.3d 118 (2d Cir. 2003) (establishing an *England*-like "Santini reservation"); *Front Royal & Warren County Indus. Park Corp. v. Town of Front Royal*, 135 F.3d 275, 283 (4th Cir. 1998) (*England* reservation might be available to takings claimants); *Dodd v. Hood River County*, 59 F.3d 852, 862 (9th Cir. 1995) (reservation is available to takings claimants to avoid claim preclusion); *Fields v. Sarasota Manatee Airport Auth.*, 953 F.2d 1299, 1306 (11th Cir. 1992) (same).

analysis of federal takings law as comprehensive as a merits determination.

That is precisely what San Remo did here. Notwithstanding the California Supreme Court's rejection of heightened judicial scrutiny, San Remo returned to federal court to argue that federal takings law is more protective than California law. Specifically, regarding its claim that the law at issue does not substantially advance a legitimate state interest, San Remo argued that federal takings law subjects legislatively imposed fees to rough-proportionality review under *Dolan v. City of Tigard*, 512 U.S. 374 (1994). San Remo contended that because state and federal law are not equivalent regarding the application of *Dolan*, issue preclusion does not apply to its *Dolan* theory. The federal district and appeals courts gave this scope-of-*Dolan* argument as much consideration as they would have given if the *Dolan* issue had been presented to them in the first instance. After full deliberation, they ruled against San Remo, applying an analysis virtually indistinguishable from a merits determination, concluding that *Dolan* does not apply to legislatively imposed fees under federal takings law. Pet. App. 17a-21a, 44a-48a, 91a-94a. San Remo then petitioned this Court for *certiorari* on the *Dolan* issue, which was denied when the Court limited review to the procedural question presented. J.A. 129. To say that *Williamson County* slammed the federal courthouse door on San Remo is to ignore reality.

Other takings claimants have been treated in similar fashion. For example, in *Dodd v. Hood River County*, 136 F.3d 1219 (9th Cir. 1998), the Ninth Circuit applied issue preclusion as required by the Full Faith and Credit Act to a takings claimant that sought compensation in Oregon

state court and then returned to federal court to litigate its federal takings claim. In determining the appropriate scope of the issue preclusion, the Ninth Circuit considered whether federal takings law is more protective than Oregon takings law. Because Oregon takings law does not recognize a claim under the multi-factor test articulated in *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978), the Ninth Circuit ruled that federal takings law is more protective and that the claimant was entitled to a full hearing on the merits of its *Penn Central* theory of liability in federal court. *Dodd*, 136 F.3d at 1228-30. The *Dodd* court addressed the *Penn Central* claim on the merits and ultimately rejected it. *Id.*

Moreover, where a state court invokes federal precedent to resolve the state law takings claims, this Court retains the ability to review that determination directly. *See* note 5, *supra*. And under *Williamson County*, takings claimants are not required to file in state court at all where state-compensation procedures are inadequate. 473 U.S. at 194-95.[8]

* * *

[8] In *Yee v. City of Escondido*, 503 U.S. 519 (1992), the Court held that in a facial challenge to a rent control ordinance alleging that the ordinance failed to substantially advance a legitimate state interest, the claimant need not seek rent increases to ripen the claim. *Id.* at 534. Because *Yee* came up through the California state courts, the Court had no occasion to consider whether a claimant bringing a facial "substantially advance" claim must seek relief in state court first, and any implication to the contrary in *Yee* would be dictum. If this Court were to rule in *Lingle v. Chevron U.S.A. Inc.* (U.S. No. 04-163) that there is no freestanding "substantially advance" theory of takings liability, the ruling would moot the question of whether such claims are subject to *Williamson County*.

In short, where a landowner alleges a taking by state or local officials, *Williamson County* requires the claimant to seek compensation in state court under state law, and no parallel federal takings claim may be filed in that proceeding. A federal takings claim does not arise until the claimant is denied just compensation in state court under state law. Reaffirmation of these first principles would clarify the law by eliminating concerns about claim preclusion and dispensing with the need for *England*-type reservations.

We show in the next section that, if the claimant files in state court, loses, and then files a federal takings claim in federal court, the federal Full Faith and Credit Act requires the application of state law on issue preclusion. If the Full Faith and Credit Act means anything, it means this lengthy litigation has finally run its course.

II. San Remo's Effort to Secure Two Forums for Its Takings Claim Is Barred By the Full Faith and Credit Act, This Court's Case Law, and Fundamental Principles of Comity, Federalism, and Judicial Economy.

Amicus Neumont warns this Court to anticipate a "chorus from respondents and their amici about how the state procedures requirement is a pillar of Western Civilization and how overruling it will usher in a new Dark Ages." Neumont Br. 23. But it is San Remo and its *amici* who are guilty of overplaying their rhetorical hand. San Remo cites unidentified "commentators" who describe *Williamson County* as "pernicious," "riddled with obfuscation and inconsistency," and "a Kafkaesque maze." Pet. Br. 16. *Amicus* Neumont accuses this Court of "fabricating the state procedures requirement" in *Williamson County* and

calls the case "a jurisprudential embarrassment." Neumont Br. 2, 4. *Amicus* Kottschade ridicules the application of *Williamson County* by the lower courts, calling it "a tragic-comic parody of law." Kottschade Br. 28.

It is nothing of the sort. *Williamson County*, as applied by the court below, is both straightforward and fair. Takings claimants must file their claims first in state court under state law. Where the state court provides a full and fair opportunity to litigate particular takings issues, claimants are not permitted to relitigate these issues in federal court.

San Remo's argument reduces to a single proposition: this framework unfairly leaves it without an unfettered opportunity to litigate its federal takings claims in federal court. As discussed above, San Remo *was* allowed to return to federal court to argue that federal takings law subjects legislatively imposed fees to the *Dolan* test. But more fundamentally, San Remo overstates its case in two basic respects. First, it fails to confront a series of cases where this Court, following the mandate of the Full Faith and Credit Act, has applied preclusion even where the result is to deprive a federal claimant of a federal forum. Second, San Remo ignores the unfairness of the outcome it proposes, which would give two bites at the apple to developers. We address each point in turn.

A. San Remo Is Not Entitled to Two Bites at the Litigation Apple.

San Remo and its *amici* assert that *Williamson County*, as applied by the lower court, has made takings claimants a "poor relation" to other federal claimants because they alone are denied an unfettered opportunity

to litigate their federal claim in a federal forum. Pet. Br. 15. But this Court has faithfully applied preclusion law even when the claimant was in a state forum involuntarily and where the result was to deprive a claimant of a federal forum altogether.

The leading example is *Allen v. McCurry*, 449 U.S. 90 (1980). Police allegedly violated McCurry's Fourth Amendment rights in the course of searching his apartment prior to his arrest. McCurry raised this violation in defending against a state criminal trial and his claim was upheld in part and rejected in part. He thereafter attempted to bring a § 1983 claim in federal court to obtain damages. McCurry argued against application of preclusion doctrines by asserting that, because he was forced into state court involuntarily, he was entitled to a federal forum for his federal constitutional claim.

This Court rejected McCurry's argument, finding it irreconcilable with the Full Faith and Credit Act. *Id.* at 99. The Court also rejected what lies at the heart of San Remo's argument here: the "generally framed principle that every person asserting a federal right is entitled to one unencumbered opportunity to litigate that right in a federal district court." *Id.* at 103. The Court held that the basis for this argument "cannot lie in the Constitution, which makes no such guarantee," *id.* at 103, and also cannot be rooted in "a general distrust of the capacity of the state courts to render correct decisions on constitutional issues." *Id.* at 105. Rather, the Court expressed its "emphatic reaffirmation * * * of the constitutional obligation of the state courts to uphold federal law, and its * * * confidence in their ability to do so." *Id.* (citing *Stone v. Powell*, 428 U.S. 465, 493-494 n.35 (1976)).

Those alleging discrimination in the workplace are subject to similar preclusion rules, as shown by *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461 (1982), and *University of Tennessee v. Elliott*, 478 U.S. 788 (1986). *Kremer* and *Elliot* apply preclusion in the context of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.*, notwithstanding Congress's express concern with preserving a federal forum for victims of workplace discrimination. As the Court recognized in *Kremer*, Title VII "implemented the national policy against employment discrimination by creating an array of substantive protections and remedies which generally allows federal courts to determine the merits of a discrimination claim." 456 U.S. at 463. Nonetheless, in *Kremer*, Justice White, perhaps the Court's foremost nationalist during his time on the Court,[9] wrote for the Court that "traditional rules of preclusion, enacted into federal law" required preclusion even though the result was to deprive Kremer of a federal forum for his federal claims. *Id.* at 485.

Kremer, like San Remo, possessed a federal claim that he hoped to litigate in federal court. But like the Just Compensation Clause, Title VII routed Kremer first to a state forum. Specifically, Title VII requires that the Equal Employment Opportunity Commission refer charges of employment discrimination first to state administrative agencies with authority to provide relief. *Id.* at 469. A federal proceeding can begin only after affording the state agency the opportunity to resolve the complaint. *Id.*

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[9] *See generally* Martin S. Flaherty, *Byron White, Federalism and the "Greatest Generation(s)"*, 74 U. Colo. L. Rev. 1573 (2003).

After a New York administrative tribunal rejected Kremer's state law claims, he appealed the tribunal's ruling in the New York courts. After losing this appeal, he attempted to litigate his Title VII claim in federal court. The district court dismissed Kremer's case under the Full Faith and Credit Act, and this Court affirmed. *Id.* at 485.

The result in *Kremer* is strikingly similar to the result complained about by San Remo here. Kremer was forced into a state forum. After receiving a full hearing in state court, he was not permitted to get a second bite at the litigation apple in federal court. This result, the Court held, was compelled by the Full Faith and Credit Act, which, as stressed by Justice White throughout his opinion, is one of Congress's most enduring and important laws because it promotes "the comity between state and federal courts that has been recognized as a bulwark of the federal system." *Id.* at 467 n.6 (quoting *Allen*, 449 U.S. at 96).

Elliott takes *Kremer* one step further. Like Kremer, Elliott pursued his employment discrimination claim first in a Tennessee administrative tribunal. Unlike Kremer, Elliott elected against a state court appeal and sued immediately in federal court, where he asserted federal claims under Title VII and other statutory and constitutional provisions. The question presented in *Elliott* was what, if any, preclusive effect should be given to the findings of the state administrative tribunal. The *Elliott* Court recognized that the Full Faith and Credit Act does not mandate preclusion with respect to "unreviewed findings of state administrative agencies," 478 U.S. at 793, but nevertheless concluded that Elliott's non-Title VII claims were precluded by the Tennessee administrative adjudication. The Court held the "parties' interest in avoiding the cost and vexation of repetitive litigation and

the public's interest in conserving judicial resources" mandated preclusion. *Id.* at 798.

Allen, *Kremer*, and *Elliott* expose a critical flaw at the center of San Remo's case. As these three cases illustrate, the desire of a federal claimant for a federal forum is frequently trumped by concerns of repose, comity, federalism, and judicial economy, and by the need to adhere to the Full Faith and Credit Act. *See also Migra v. Warren City School Dist. Bd. of Educ.*, 465 U.S. 75, 84 (1984) ("[I]t is more important to give full faith and credit to state-court judgments than to ensure separate forums for federal and state claims."). In *Williamson County*, this Court ruled as a matter of constitutional law that takings claimants must first seek compensation in state court. Where a state court provides a takings claimant with a full and fair hearing, the federal Full Faith and Credit Act requires that this Court give those state rulings their full preclusive effect.

As *Elliott* demonstrates, even absent the mandates of the federal Full Faith and Credit Act, San Remo would bear a heavy burden in proposing that this Court waive application of issue preclusion in the context of a case litigated first in state court pursuant to *Williamson County*. As Justice Marshall wrote for the Court in *Montana v. United States*, 440 U.S. 147 (1979), preclusion "is central to the purpose for which civil courts have been established, the conclusive resolution of disputes within their jurisdictions." *Id.* at 153. San Remo has offered this Court no compelling reason for waiving the application of this central and eminently sensible doctrine.

San Remo complains about being "consigned to the state courts." Pet. Br. 14. *Amicus* Kottschade goes further, strangely suggesting that the application of the Full Faith

and Credit Act here would "lead to a *sub rosa* resuscitation of the discredited 'interposition doctrine' that reared its head briefly in the wake of *Brown v. Board of Education.*" Kottschade Br. 8 n.5. But San Remo has not provided this Court with *any* evidence that property owners are systematically mistreated in state court.[10]

Indeed, San Remo has failed even to offer an explanation as to why state judges would be biased against claims by property owners or more hostile to property claims than their federal counterparts.[11] As Judge Easterbrook has recognized, this proposition defies common sense:

> Federal courts are not boards of zoning appeals. This message, oft-repeated, has not penetrated the consciousness of property owners who believe that federal judges are more hospitable to their claims than are state judges. Why they should believe this we haven't a clue; none has ever prevailed in this circuit, but state courts often afford relief on facts that do not support a federal claim.

River Park, Inc. v. City of Highland Park, 23 F.3d 164, 165 (7th Cir. 1994).

[10] Pacific Legal Foundation (PLF Br. 15-16) cites a study concluding only that this Court's rulings are "not influencing state court judges to tilt their discretion toward property owners' interests." *See* Ronald H. Rosenberg, *The Non-Impact of the United States Supreme Court Regulatory Takings Cases on State Courts: Does the Supreme Court Matter?*, 6 Fordham Envtl. L.J. 523, 556 (1995). This is a far cry from proving a systematic state court bias against property owners. PLF's remaining sources (Br. 16) are critical of the treatment of property owners by California courts, but the best evidence on that issue is the treatment by the California courts of San Remo here, and neither San Remo nor its *amici* argue that the California courts failed to give San Remo a full and fair hearing.

[11] PLF speculates (Br. 16) that federal judges might be "more disposed to vindicate the exercises of property rights that do not benefit immediate neighbors." *Id.* But one could argue to the contrary that the political and community pressures bearing down on state judges make them more predisposed to the interests of powerful and wealthy landowners. In any event, PLF's musings do not come close to overcoming this Court's oft-stated trust of state courts to fairly adjudicate federal constitutional questions. *See Allen*, 449 U.S. at 105.

Even were there evidence that a particular state court had mistreated takings claimants, a federal court could address this inequity while remaining in full compliance with the Full Faith and Credit Act. As this Court explained in *Allen*, preclusion applies only where a litigant has "full and fair opportunity" to litigate in state court. 449 U.S. at 101. Thus, the *Allen* Court instructed lower courts not to apply preclusion where "state law did not provide fair procedures for the litigation of constitutional claims, or where a state court failed to even acknowledge the existence of the constitutional principle on which a litigant based his claim." *Id.*

But San Remo does not claim that the hearing it received in the California courts was unfair, nor could it. Instead, San Remo asserts that every claimant should get a full and fair hearing in state court and then, if it loses, another full hearing in federal court. As explained above, this result is prohibited by the Full Faith and Credit Act and the fundamental principles of comity, federalism, and judicial economy that underlie the Act.

B. Giving Takings Claimants Two Bites at the Apple Would Give Developers an Unfair Advantage in Dealing with Local Officials.

While San Remo and its *amici* imply that state agencies and state courts systemically mistreat developers and other property owners, the reality is exactly the opposite.

Pro-development professionals serve in disproportionate numbers on planning and zoning boards. *See* Jerry L. Anderson & Erin Sass, *Is the Wheel Unbalanced? A Study of Bias on Zoning Boards*, 36 Urb. Law. 447, 466 (2004). And developers have become adept at using litigation, and often just the threat of litigation, as a tool for advancing their interests.

Ninety percent of American municipalities have less than 10,000 people and cannot afford a full-time municipal lawyer. *See* S. Rep. No. 105-242, at 44-45 (1998) (minority views). For these municipalities, defending against a single takings suit by a wealthy developer can result in debilitating costs. For example, Hudson, Ohio, a community of 22,000, had to spend more than $400,000 in an ultimately successful effort to defend against a challenge to the city's growth management ordinance spearheaded by the Home Builders Association of Greater Akron. *See* Eliza Newlin Carney, *Power Grab*, Nat'l J., Apr. 11, 1998, at 798, 800.

Litigation costs for small communities have soared in recent years. The "'explosion in the non-traditional use of civil rights statutes – most important, section 1983 of the Civil Rights Act of [1871] – to include cases involving such areas as zoning and land development'" is a "driving factor" in these increased costs. Susan A. MacManus, *The Impact of Litigation on Municipalities: Total Cost, Driving Factors, and Cost Containment Mechanisms*, 44 Syracuse L. Rev. 833, 836-840 (1993) (citation omitted).

Not surprisingly, the fear of big litigation bills alters the behavior of local officials. For example, a California Research Bureau study found that cities that have been sued for takings are twice as likely to report having

changed their regulatory behavior as those who have not been sued. *See* Daniel Pollak, *Have the U.S. Supreme Court's 5th Amendment Takings Decisions Changed Land Use Planning in California?*, 27 (California Research Bureau, 2000). The report concluded that "takings objections, litigation threats, and even lawsuits have become a common aspect of land use planning discussions." *Id.*

For small municipalities, a lawsuit in an often distant, unfamiliar, federal court represents an even greater threat to community interests and resources. To litigious developers, this means that the threat of a federal suit is a bigger club. This is at least part of the reason *amici* National Association of Home Builders (NAHB) asserted that federal bills intended to overrule *Williamson County* were its "main legislative initiatives" during the 105th and 106th Congresses. John J. Delaney and Duane J. Desiderio, *Who Will Clean Up the "Ripeness Mess"? A Call for Reform So Takings Plaintiffs Can Enter the Federal Courthouse*, 31 Urb. Law. 195, 195 (1999). The current Chief Executive Officer of the NAHB candidly called one such bill a much-needed "hammer to the head" of state and local officials. *See* Brody Mullins, *Property Takings Bill Set For House Fight*, National Journal's Congress-Daily AM (March 14, 2000).

Landowners deserve a fair forum and a full hearing for their constitutional claims. San Remo received its fair hearing already. To grant San Remo's request in this case would unfairly put two hammers to the heads of local officials.

III. *Williamson County* Should Not Be Overruled.

Evidently recognizing that the Full Faith and Credit Act requires application of issue preclusion here, certain *amici* supporting San Remo urge this Court to overrule *Williamson County*. Significantly, however, San Remo neither raised this issue in its Petition nor addressed it in its merits brief. As the Court observed in *Yee*, "it is the petitioner himself who controls the scope of the question presented. The petitioner can generally frame the question as broadly or as narrowly as he sees fit." 503 U.S. at 535. As in *Yee*, San Remo's failure to raise the issue should dispose of the matter.

Moreover, in the past this Court has not viewed issues regarding the soundness and viability of existing precedents to be fairly included within questions presented regarding the application of those precedents. *See Del Monte Dunes*, 526 U.S. at 704 ("declin[ing] the suggestions of *amici* to revisit [applicable] precedents" where the city did not challenge them); *Thornton v. United States*, 124 S. Ct. 2127, 2132 & n.4 (2004) (refusing to overrule established constitutional precedent governing automobile searches because the petitioner had not argued that prior precedent be limited).

We will resist the urge to rebut in comprehensive fashion the eristic arguments proffered by San Remo's *amici*, but we mention a few responses in summary fashion because they provide additional reasons not to address the issue at all. Briefly put, *Williamson County*'s state-compensation requirement is longstanding rule of law that has been repeatedly reaffirmed. It is based on controlling authorities extending back more than 100 years. 473 U.S. at 194. It is expressly predicated on the

text of the Just Compensation Clause. *Id.* Its analysis is drawn from, and inextricably intertwined with, parallel lines of authorities that govern cases brought under the Tucker Act (*id.* at 194-95) and the Due Process Clause (*id.*), and should not be revisited without full consideration of how changes would influence those lines of cases. Much of the academic literature agrees with the Court's reading of the Fifth Amendment articulated in *Williamson County*.[12] Finally, addressing the status of *Williamson County* at the eleventh hour in this case, without adequate notice, would be tremendously unfair to state and local officials and the public at large.

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[12] *E.g.*, Thomas E. Roberts, *Ripeness and Forum Selection in Fifth Amendment Takings Litigation*, 11 J. Land Use & Envtl. L. 37, 38, 73 (1995) (concluding that the state-compensation requirement is "based on the nature of the Fifth Amendment," and that changes to the requirement are ill-advised because federal courts are "busy enough," and state courts "can do a better job of evaluating local and state interests"); Max Kidalov and Richard H. Seamon, *The Missing Pieces of the Debate Over Federal Property Rights Legislation*, 27 Hastings Const. L. Q. 1, 3-4 (1999) (arguing that the state-compensation requirement is "an element of a cause of action for a violation of the Just Compensation Clause" and that "[t]he elimination of that requirement would change the substance of takings law"); Kathryn E. Kovacs, *Accepting the Relegation of Takings Claims to State Courts: The Federal Courts' Misguided Attempts to Avoid Preclusion Under* Williamson County, 26 Ecology L. Q. 1 (1999) (agreeing that a "federal takings claim simply does not exist before the state inverse condemnation claim is resolved, and may not, therefore, be considered alongside the state claim in state court").

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

TIMOTHY J. DOWLING*
DOUGLAS T. KENDALL
Community Rights Counsel
1301 Connecticut Ave., N.W.
Suite 502
Washington, D.C. 20036
(202) 296-6889

**Counsel of Record for the Amici Curiae*

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